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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No.

CECIL EUGENE HARRIS, a/k/a "RED" HARRIS, PHILLIP GALE WOLFE, RONNIE LYNN JONES, MARLIN KEITH BUMPASS, HOUSTON P. LITTLEFIELD, a/k/a "HOOT" LITTLEFIELD, AND JACKIE WADE HAWKINS,

Petitioners

versus

UNITED STATES OF AMERICA,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners

vs.

UNITED STATES OF AMERICA,

The petitioners Cecil Eugene Harris, Phillip Gale Wolfe, Ronnie Lynn Jones, Marlin Keith Bumpass, Houston P. Littlefield, and Jackie Wade Hawkins respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A, infra. No opinion was rendered by the District Court for the Northern District of Texas.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit (Appendix B, infra) was entered on May 22, 1972. A timely petition for rehearing (Appendix C, infra) was denied on June 19, 1972, and this petition for certiorari was filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the federal statute which prohibits illegal gambling businesses, 18 U.S.C. §1955, represents an unconstitutional invasion by Congress of the powers specifically reserved to the States by the Tenth Amendment to the Constitution of the United States.

2. Whether Congress intended to include employees within the definition of "conduct" as used in 18 U.S.C. §1955 and, therefore, within the terms of the statute used to describe the five or more persons who conduct, finance, manage, supervise, direct or own all or part of the gambling business prohibited by the statute.

3. Whether the transfer of Petitioners' cause to the Summary Calendar through application of Fifth Circuit Local Rule 18 and the subsequent refusal to allow oral argument was a denial of Petitioners' right to the effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States of America, Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right *** to have the Assistance of Counsel for his defense."

Constitution of the United States of America, Tenth Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. 1955:

§1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section -

(1) "illegal gambling business" means a gambling business which-

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of

thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as

applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

FIFTH CIRCUIT LOCAL RULES:

Rule 18. Summary Calendar:

(a) Whenever the Court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.

(b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the

Court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

STATEMENT OF THE CASE

Near the end of January, 1971, petitioners Harris, Wolfe, Jones, and Hawkins opened a gambling club in Hockley County, Texas, under the name of "The Improved Order of Redmen, Seminole Tribe No. 7." Petitioners Littlefield and Bumpass were hired by Ronnie Jones, the club manager--Littlefield as the gatekeeper and nightwatchman, Bumpass as a part-time blackjack dealer and dice "stickman." Littlefield and Bumpass, as employees of the club, were paid cash salaries at the end of each week, which did not vary with the winnings or losses of the Redmen's Club. Neither had any managerial authority.

On March 12, 1971, pursuant to a search warrant issued earlier that day, agents of the Federal Bureau of Investigation conducted a raid on the Redmen's Club. All six of the petitioners were present and were taken into custody. Gambling was shown to have occurred on the premises and sundry gambling equipment was seized in the raid.

After a jury trial in the United States District Court for the Northern District of Texas, Lubbock Division, the six petitioners were convicted of conducting an illegal gambling business in violation of 18 U.S.C. §1955.

Following the convictions in district court, petitioners filed an appeal in the Fifth Circuit Court of Appeals. After the briefs had been presented, the petitioners were notified that their case had been placed on the summary calendar for disposition without oral argument. Petitioners' convictions were subsequently affirmed on May 22, 1972, and their petition for rehearing was denied on June 19, 1972. The Court of Appeals granted the petitioners a thirty-day stay of mandate in order to allow the filing of this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. THE CONGRESSIONAL ATTEMPT TO PROHIBIT ILLEGAL GAMBLING BUSINESSES THROUGH 18 U.S.C. §1955 REPRESENTS AN UNCONSTITUTIONAL USURPATION OF THE POWERS SPECIFICALLY RESERVED TO THE STATES BY THE TENTH AMENDMENT TO THE CONSTITUION OF THE UNITED STATES. EVEN IF FOUND TO BE CONSTITUTIONAL, HOWEVER, APPLICATION OF THE STATUTE TO THE PETITIONERS IN THIS CASE GOES BEYOND THE CLEAR INTENT OF CONGRESS.

In upholding the constitutionality of section 1955, the Fifth Circuit Court of Appeals emphasized the power of Congress to regulate illegal gambling under Article 1, Section 8, of the United States Constitution. Petitioners do not dispute the fact that Congress has that power under appropriate circumstances. In the words of Mr. Justice Stewart, "Congress surely has the power under the Commerce Clause to enact criminal laws to protect the instrumentalities of interstate commerce, to

prohibit the misuse of the channels or facilities of interstate commerce and to prohibit or regulate those intrastate activities which have a demonstrably substantial effect on interstate commerce." Perez v. United States, 91 S. Ct. 1357, 1363 (1971). Petitioners do not contest the right of Congress to regulate or prohibit gambling where "substantial effect on interstate commerce" has been shown or even under the "class of activities" theory presented by Maryland v. Wirtz, 392 U.S. 183, 192 (1968) and United States v. Darby, 312 U.S. 100.

Rather, the issue is whether the particular method of regulation chosen by Congress in this instance is constitutional in its approach. As this Court held in Katzenbach v. McClung, 379 U.S. 294 (1964), Congress must have a rational basis for finding that the method chosen for regulation is necessary for the protection of interstate commerce. All related sections of Chapter 95, Title 18, U.S.C., make specific reference to interstate activity. Section 1955 alone appears to penalize intrastate activity without relation to any operations or communications across state lines. It is this overbreadth of the statute to which petitioners object--an overbreadth which allowed the Government to reach beyond any reasonable intendment of the statute and secure the conviction of the petitioners for a crime that was wholly local in nature.

Traditionally, the bulk of authority to legislate in the field of criminal law has rested with the States. The police power of the State must be respected by Congress, unless there is a clear collision with national law and policy. Kesler v. Department of Public Safety, 369 U.S. 153,

82 S.Ct. 807, 7 L. Ed. 2d 641 (1962). In effect, Congress may make laws to protect national interests, but it may not enforce state criminal laws that are concerned with wholly local activity.

Gambling activity may or may not affect interstate commerce. But "gambling activity" as a generic term is too broad in scope because it includes wholly local activity that is part of the reserved regulatory power of the States. The statute fails to delineate between local and national activity. Although there is a presumption of the validity of statutes passed by Congress, the presumption should not be allowed to support an extention of the federal criminal law into an area reserved to the States.

Even though the court of appeals stated that no proof of interstate ramifications is necessary for conviction under section 1955, it then proceeded to show what those ramifications were and how the judgment of Congress was vindicated. Most of those activities listed by the court as affecting interstate commerce defy credulity. Surely such actions as the payment of Social Security taxes for employees, the use of United States currency, the maintenance of an account in a national bank, and the possession of a telephone connected by an interstate communications carrier are not matters to be considered when determining interstate activity or effect on interstate commerce. If so, then absolutely nothing is outside the scope of the Commerce Clause, and the Tenth Amendment to the United States Constitution serves no purpose and reserves nothing to the States.

Further, the petitioners contend that Section 1955 does not make the necessary distinction intended by Congress between the large syndicated gambling operations which are "so substantial as to be of national concern," and the small, local, intrastate operations which barely meet the minimum definitions of the statute. The intent of Congress and the purpose for which the statute was passed are clearly indicated in the legislative history of the Act as follows:

> The intent of section 1511 and section 1955, below, is not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions. It is anticipated that cases in which their standards can be met will ordinarily involve business-type operations of considerably greater magnitude than simply meet the minimum definitions. The provisions of this title do not apply to gambling that is sporadic or of insignificant monetary proportions. It is intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern, and those corrupt State and local officials who make it possible for them to function.

U.S. Code Cong. and Adm. News, 1970, p. 4029

The "class of activities" relied on by the Fifth Circuit in upholding this statute is illegal gambling. That classification is too broad and goes beyond the intent of Congress expressed above. If Congress intended to attack any "class," it was one composed of systematic, syndicated business-type operations of sufficient magnitude to be of national concern.

In this case there was absolutely no evidence that petitioners' operations were syndicated or in any way tied to organized crime, nor was there any showing that the "business" was of major proportions or of national concern. Petitioners' business barely met the minimum definitions of the statute.

Section 1955 appears to go further than any previous act of Congress in usurping the police powers of local and State governments and creating a national police force. Serious constitutional questions of significant magnitude are raised by the statute contested in this case, and a definitive ruling from this Court would appear to be essential to the constitutional administration of justice in this area of federal criminal law.

2. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A CONVICTION AS THERE WAS NO PROOF THAT FIVE OR MORE PERSONS PARTICIPATED IN THE CONDUCTING, FINANCING, MANAGING, SUPERVISING, DIRECTING, OR OWNING OF A GAMBLING OPERATION AS REQUIRED BY 18 U.S.C. §1955.

The record is devoid of evidence that petitioners Littlefield and Bumpass conducted, financed, managed, supervised, or directed a gambling operation as required

by the statute. Littlefield and Bumpass were mere employees, working for wages. Neither contributed any capital to the operation, and neither shared any profits or losses.

The petitioners' contention here, as below, is that the statute does not apply to mere employees. The Circuit Court cites the legislative history of 18 U.S.C., Section 1511, a conspiracy statute entitled "Obstruction of State or local law enforcement," for the proposition that the word "conducts" refers to both high level bosses and street level employees. The violation charged, however, is under 18 U.S.C. 1955. The House Committee on The Judiciary Report No. 91-1549, 91st Cong., 2nd Sess., relied on by the court below, is silent as to the meaning of "conducts" as contained in the statute under consideration.

Indeed, the trial court instructed the jury, as noted by the Circuit Court (Appendix A), that:

> "... a mere employee who has no ownership in such business and who is also without the power to conduct, finance, manage, supervise, or direct such business could not be considered by you as one of the number of persons necessary to prove a violation of the federal statute..."

The question presented clearly calls for a construction of congressional intent. Waitresses and a cook from the establishment testified at trial. Under the Fifth Circuit holding, they too could be charged, as the court seemingly relies on the House Report on a different statute for its definition of "conduct".

A more rational construction of the statutory language is that the word "conducts," as do the other words in the statute, refers to something more than the redundant and restricted labors of a salaried employee who has neither a stake in the operation nor derives any benefit or detriment from its success or failure.

The undisputed evidence showed that petitioners Bumpass and Littlefield were salaried workers making no decisions and having no authority. Bumpass was a hired blackjack dealer and dice "stickman." Not only did he lack authority to raise the table limit or approve credit or checks, but he lacked authority even to cash in winners. With a regular job in a liquor store, he was a purely ministerial employee, in a class with waitresses and the cook.

Littlefield was a gatekeeper and night watchman, never participating in gambling, and never entering the game room during business hours. The clear intendment of the statutory language is that it encompasses those persons with some stake in the operation, who by their entrepreneurship and organizational activities establish an illegal gambling operation. The evidence being insufficient as to two petitioners, the case against all must fall for lack of the requisite number of persons.

3. THROUGH PASSAGE AND IMPLEMENTATION OF LOCAL RULE 18, THE FIFTH CIRCUIT COURT OF APPEALS HAS ABUSED ITS AUTHORITY TO CONTROL ITS APPELLATE DOCKET. BY DENYING ALL ORAL ARGUMENT IN CASES PLACED ON THE SUMMARY CALENDAR, THE COURT HAS UNCONSTITUTIONALLY DEPRIVED THE PETITIONERS OF THEIR RIGHT TO THE EFFECTIVE

ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Even though this was a case of first impression in the Fifth Circuit and only the second involving 18 U.S.C. §1955 to reach the appellate level anywhere, the petitioners were notified after the briefs were filed that the case had been transferred to the summary calendar (App. D infra_ pursuant to Local Rule 18 and was thus to be decided on the briefs without benefit of oral argument. The appellate rules of procedure do not provide the accused with any hearing regarding this transfer or for any appeal from the Court's decision to place the case on the summary calendar. The subsequent determination of the case without oral argument deprived the petitioners of their constitutionally guaranteed right to the effective assistance of counsel.

There is no question that appellate review has become an integral part of our criminal justice system. The importance of this can be seen in the increasing number of cases which are appealed and in the resulting burden being placed on the appellate courts. The courts are given power to prescribe rules for administration under 28 U.S.C. 2071, and Rule 47, Federal Rules of Appellate Procedure, but those rules cannot be allowed to infringe upon the constitutionally guaranteed rights of the parties. By denying oral argument, Rule 18 deprives the accused of his right to the effective assistance of counsel at one of the most critical times in the entire judicial process.

The importance of oral argument at the

appellate level is best understood by referring to the opinions and attitudes of judges who must decide the cases brought before them on appeal. In this regard, see generally R. STERN and E. GRESSMAN, SUPREME COURT PRACTICE (4th ed. 1969) Sec. 14.1 at 483. Rule 45 of the Supreme Court Rules indicates that this Court has recognized the importance of oral argument to the appellate process: "1. The court looks with disfavor on the submission of cases on briefs, without oral argument, and therefore may, notwithstanding such submission, require oral argument by the parties."

It is understandable that the court of appeals, overburdened by its busy docket, would feel the need to seek methods which make the judicial process more efficient; however, "the Constitution recognizes higher values than speed and efficiency." Stanley v. Illinois, 31 L.Ed. 2d 551 (1972). Reasonable rules of administration such as those which limit the number of counsel allowed to argue or the length of time provided for argument are acceptable functional attempts to speed the judicial process while preserving the right to the effective representation of counsel, but a rule which entirely eliminates oral argument destroys counsel's opportunity to clarify the issues and, therefore, violates the Sixth Amendment.

Whether or not the right to effective counsel at the appellate stage includes the right to oral argument is an important question of federal procedure which affects large numbers of appellants and should be settled by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of July, 1972, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Solicitor General, Department of Justice, Washington, D. C. 20530. I further certify that all parties required to be served have been served.

EMMETT COLVIN, JR.
1718 Adolphus Tower
Dallas, Texas 75202

COUNSEL FOR PETITIONERS

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-3586

Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CECIL EUGENE HARRIS, a/k/a "RED" HARRIS, PHILLIP GALE WOLFE, RONNIE LYNN JONES, MARLIN KEITH BUMPASS, HOUSTON P. LITTLEFIELD, a/k/a "HOOT" LITTLEFIELD and JACKIE WADE HAWKINS,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

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(May 22, 1972)

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

AINSWORTH, Circuit Judge: A jury found all six appellants guilty of illegal gambling in violation of 18

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F. 2d 409, Part I.

U.S.C. § 1955. In their appeal they assert the following four claims of error:

1.) That 18 U.S.C. § 1955 is an unconstitutional invasion by Congress on the powers reserved to the states by the Tenth Amendment of the United States Constitution;

2.) That the evidence was insufficient to sustain the convictions because there was no proof that five or more persons participated in the crime as required by 18 U.S.C. § 1955;

3.) That the Trial Court erred in overruling appellants' motion to suppress and limit evidence obtained pursuant to a warrant supported by an affidavit which was insufficient to establish probable cause; and

4.) That certain statements of appellant Harris were admitted into evidence in violation of appellant's Fifth and Sixth Amendment rights.

We find no merit in any of these contentions and the judgments of conviction are affirmed.

Appellants operated a gambling casino, known as The Redmen's Club, in Hockley County, Texas, where games of craps and blackjack were conducted. The operation was located in a house which, in addition to a kitchen and several smaller rooms, consisted of a game room where the gambling occurred and a dining room where the customers were served free meals and drinks. One witness described the operation as

"just like Las Vegas." A large sign at the gate announced that the premises were operated under the auspices of a fraternal order known as "The Improved Order of Redmen, Seminole Tribe No. 7," which is a legitimate, nationwide organization originally chartered in 1906 by special act of the United States Congress, but which had no connection whatsoever with appellants' gambling activities. The club was open six nights a week and was in substantially continuous operation for a period in excess of thirty days. Appellants conducted the operation in a businesslike atmosphere. A bank account was maintained in a national bank for the purpose of paying employees of the club and paying various business and operating expenses. Insurance was maintained on the improvements to the real property where the club was located. Telephone service was supplied to the club by General Telephone Company of the Southwest under the listing of Improved Order of Red Men Lodge. Gas purchases were made from Plains Gas, Incorporated, under the account of I.O.R.M. Lodge. Numerous witnesses testified to the existence and nature of the gambling activities conducted. Gambling paraphernalia seized at the club was introduced into evidence at the trial of this cause.

Defendant Ronnie Jones was the manager of the club. He sold and bought chips, hired employees, furnished credit for customers, and signed invoices for the delivery of meat to the club.

Defendant Jackie Hawkins was a dealer in card games. He sold chips and signed invoices for delivery of meat to the club.

Defendant Cecil Harris greeted customers at the door. He cashed chips for customers and signed invoices for gas delivered to the club and lumber purchased by the club.

Defendant Phillip Wolfe was a dealer in the game room. He sold chips and had the right to authorize credit to the customers.

Defendant Houston Littlefield was a guard or watchman for the business. Littlefield was on the premises at all times. He lived there and used the premises for his domicile.

Defendant Marlin Bumpass was a dealer at the club. He arrived late and relieved other dealers. He dealt at the blackjack games and was stickman at the crap table every night, representing the house.

I.

18 U.S.C. § 1955 IS NOT UNCONSTITUTIONAL, IN VIOLATION OF THE TENTH AMENDMENT, AND IS A VALID AND CONSTITUTIONAL EXERCISE OF CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

Appellants complain that 18 U.S.C. § 1955,[1] pursuant to which they were convicted, is not an appropriate

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[1]Pub. L. 91-452, Title VIII, § 803, Oct. 15, 1970, 84 Stat. 922 (The Organized Crime Control Act of 1970), 18 U.S.C. § 1955, provides in relevant part that

"§ 1955. Prohibition of illegal gambling businesses

exercise by Congress of the power to regulate interstate commerce under Article I, Section 8 of the United States Constitution which gives Congress the power to regulate interstate commerce. The Supreme Court held in *Katzenbach v. McClung*, 379 U. S. 294, 85 S. Ct. 377 (1964), that Congress must have a rational basis for finding that the chosen method is necessary for the protection of interstate commerce:

> "The activities that are beyond the reach of Congress are 'those which are completely in a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of

---

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section —

(1) 'illegal gambling business' means a gambling business which --

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) 'gambling' includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States."

> the general powers of the government.' Gibbons v. Ogden, 9 Wheat. 1, 195, 6 L. Ed. 23, 70 (1824). This rule is as good today as when Chief Justice Marshall laid it down almost a century and a half ago."

Id. at 302, 85 S. Ct. at 383. See also *Perez v. United States*, 402 U. S. 146, 91 S. Ct. 1357 (1971).

Appellants assert that the legislative history of Section 1955 is barren of factual material that would support a finding of the requisite connection between illegal gambling per se and interstate commerce. Thus, they argue, the right to regulate such purely local gambling is expressly reserved to the states by the Tenth Amendment.[2] See, e. g., *Kesler v. Department of Public Safety, etc.*, Utah, 369 U. S. 153, 82 S. Ct. 807 (1962); *Knapp v. Schweitzer*, 357 U. S. 371, 78 S. Ct. 1302 (1958); *Marshall v. United States*, 9 Cir., 1966, 355 F. 2d 999. We disagree.

Section 1955 is part of Title VIII of the Organized Crime Control Act of 1970. Section 801 of Title VIII of the Act states the following finding in unambiguous fashion:

> "The Congress finds that illegal gambling involves widespread use of, and has an effect

---

[2]The Tenth Amendment provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

upon, interstate commerce and the facilities thereof."

Pub. L. 91-452, Title VIII, § 801, Oct. 15, 1970, 84 Stat. 922. Appellants contend that such "[p]erfunctory statements ... cannot, alone, serve as the necessary rational basis for the statute," citing *Perez v. United States*, 402 U. S. 146, 91 S. Ct. 1357 (1971), where the Supreme Court examined in detail the economic, financial, and social setting as presented to Congress in numerous reports and hearings concerning the background of 18 U.S.C. § 891. A study of the legislative history of the Organized Crime Control Act of 1970, however, shows beyond question that Congress had ample evidence to support the finding announced in Section 801.

In its Statement of Findings and Purpose made prior to the passage of the Organized Crime Control Act of 1970, the Congress declared and found among other things that "organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling...." U. S. Code. Cong. and Adm. News, 1970, p. 1073.

The Congressional Record is filled with evidence to support the conclusions, parts of which are set out in a footnote.[3] In a letter to Chairman Celler of the House

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[3]In considering the passage of the Organized Crime Control Act of 1970 (S. 30), Congress had before it the 1967 Report of President Johnson's Commission on Law Enforcement and the Administration of Justice. Congressman Rodino of New Jersey

related parts of the report to the House in its consideration of the bill:

> "The Commission's Task Force on Organized Crime succinctly described the extent of the problem in the statement:
>
> " 'Organized crime exists by virtue of the power it purchases with its money. The millions of dollars it can invest in narcotics or use of layoff money give it power over the lives of thousands of people and over the quality of life in whole neighborhoods. The millions of dollars it can throw into the legitimate economic system give it power to manipulate the price of shares on the stock market, to raise or lower the price of retail merchandise, to determine whether entire industries are union or nonunion, to make it easier, or harder for businessmen to continue in business.'
>
> "In fact, as the Task Force report concludes:
>
> " 'The purpose of organized crime is not competition with visible, legal government but nullification of it.' "

Cong. Rec., Vol. 116, No. 175, p. H 9656, Oct. 6, 1970. In concluding his statements, Congressman Rodino stated:

> "Mr. Chairman, organized crime affects the lives of millions of Americans, yet operates outside the control of the American people and of our governments. Drastic methods to combat it are essential, and we must develop law enforcement measures at least as efficient as those of organized crime. With S. 30 we will provide not a panacea to rid the Nation of organized crime but the basis for an effective national program and generate a truly full-scale commitment to destroy the insidious power of organized crime groups. So while I have serious questions about some provisions of S. 30, I support it and urge its approval. It is an essential measure in the effort to eradicate the dreadful disease of organized crime that now afflicts the Nation."

Congressman St. Germain spoke in support of S. 30. He stated:

> "The strong measures contained in this legislation are aimed at ridding our society of the highly profitable business of organized crime, and they are long overdue. Organized crime has been financially bleeding this country with increasing efficiency over a period of years.... Chairman Dante Fascell of the Government Operations Subcommittee on Legal and Monetary Affairs, of which I am a member, estimated

the gross revenue of organized crime in this country at $60 billion. . . .

"Gambling is generally thought to be the most profitable of the illegal goods and services provided by the rackets and the syndicates. The President's Crime Commission reported in 1967 that enforcement officials believe that illegal betting on horse races, lotteries, and sporting events totals about $20 billion, with a net profit of $6 to $7 billion a year. If gambling is the most profitable of the rackets — and some believe loan sharking may be about equal with it-it is not the most lethal. The profits from gambling and usurious loans go into financing the deadly narcotics trade, and the profits here at the importing and wholesaling ends are as astronomical as is the cost paid for this traffic by society — in terms of human lives and the street crime motivated by the addicts' need for money to buy drugs.

. . . .

"For example, I noted earlier that most of organized crime's profits are untaxed, but there are considerable overhead expenses. One of the most ominous statistics turned up by the President's Crime Commission in their surveys was the estimated $2 billion paid out each year by organized crime to public officials in and out of the criminal justice system to buy immunity from the law. Further, from fake bankruptcy suits to theft of Wall Street securities to 'partnership' in small and large manufacturing companies, the syndicates are well represented in business and industries, alphabetically from automobile agencies to vending machines, in which organized crime is active, and indicated that this was only a partial list.

. . . .

"Title VIII, Syndicated Gambling, would make large-scale gambling a Federal offense."

Id. at H 9656-57. Congressman McCullough noted that "Syndicated gambling is the mob's principal source of income, estimated at $7 billion a year. The interstate gambling enterprise could not function without the connivance and corruption of State and local officials in the obstruction of State laws." Id. at H 9657-58. Congressman McDade noted that "There are three major sources for all of this wealth, namely, gambling operations with a conservative estimated take of $20 billion annually and a $6 billion profit, most of it coming from those

Committee on the Judiciary, who had requested the views of the Department of Justice on various provisions of the Organized Crime Control Act of 1970, the Department of Justice noted that Title VIII of the Act was properly predicated "squarely upon the tested and proven constitutional basis which the commerce clause affords' and that it was "directed solely to the objective of providing for more effective Federal prosecution of illegal gambling — the lifeline of organized crime." U. S. Code Cong. and Adm. News, 1970, p. 4064. In the same letter it was stated that "Federal

---

who can least afford to pay; loan sharking, $350 million per year; and narcotics, $350 million per year, almost all from the poor." Id. at H 9674. See also the remarks of Congressmen Fascell, H 9673; Halpern, Id. at H 9673; and Donohue, Id. at H 9674.

Congress sought through the Organized Crime Act of 1970 to eliminate a severe threat to the nation's well-being. Congressman Kleppe noted that " the threat of organized crime cannot be ignored or longer tolerated. It is America's principal supplier of illegal goods and services — gambling, usurious loans, illicit drugs, and prostitution; daily it increases its operation in fields of legitimate business, employing such illegitimate techniques as bankruptcy frauds, tax evasion, extortion, terrorism, arson and monopolization. Its sinister effects upon our Nation must be eradicated." Id. at H 9663. In a similar vein, Congressman Clancey stated that

> "Organized crime today represents a serious threat to the well-being of this entire Nation. It is an evil which is gradually infiltrating and poisoning every phase of American life. It is corrupting our society, our economy, and our future. The money and power gained by the masters of organized crime is amazing. This illegal menace is entering into every phase of our lives. It drains countless dollars from our economy, it corrupts our free enterprise system and our democratic processes, and, in general, it undermines our entire Nation and our way of life."

Id. at H 9663. See also Report of the Senate Committee on the Judiciary, S. R. 91-617.

jurisdiction under title VIII rests upon specific findings of the Congress that illegal gambling, in diverse ways, involves the widespread use of interstate commerce, and affects interstate commerce." Id.

H. R. Rep. No. 91-1549, accompanying Senate Bill No. 30 which was adopted as the Organized Crime Control Act of 1970, Pub. L. 91-452, contains the following statement with reference to Title VIII:

> "The intent of section 1511 and section 1955, below, is not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions. It is anticipated that cases in which their standards can be met will ordinarily involve business-type operations of considerably greater magnitude than simply meet the minimum definitions. The provisions of this title do not apply to gambling that is sporadic or of insignificant monetary proportions. It is intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern, and those corrupt State and local officials who make it possible for them to function."

U. S. Code Cong. and Adm. News, 1970, p. 4029.

The case of *Perez v. United States*, 402 U. S. 146, 91 S. Ct. 1357 (1971), curiously relied upon by appel-

lants, provides direct support for the Government's position. *Perez* involved a congressional finding of the interstate impact of "loan sharking" operations. The Supreme Court noted that Congress in seeking to regulate loan-shark activity found that extortionate credit transactions "are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce." Id. at 147 n. 1, 91 S. Ct. at 1358 n. 1. Congress there found that "Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce." Id. Congress's finding in Section 801 of Title VIII of the Organized Crime Control Act of 1970 is indeed similar. In *Perez*, the Court noted that Congress had before it a Report by the President's Commission on Law Enforcement and Administration of Justice which stated that loan sharking was "the second largest source of revenue for organized crime." Id. at 155, 91 S. Ct. at 1362. In the present case, Congress had before it evidence that illegal gambling profits were the principal source of revenue for organized crime. The Court in *Perez* upheld the constitutionality of Title II of the Consumer Credit Protection Act, 18 U.S.C. § 891, even though the petitioner in that case was convicted solely for an act intrastate in character. The conviction was upheld on the authority of Congress to enact the criminal sanction based on its findings as previously noted. The case presently before us under Title VIII of the Organized Crime Control Act of 1970 is no different. Congress has here enacted legislation particularly suited to its finding that "illegal

gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof."

The power of Congress to legislate under the Commerce Clause of the Constitution "is not confined to the regulation of commerce among the states." *United States v. Darby*, 312 U. S. 100, 118, 61 S. Ct. 451, 459 (1941). It also extends to intrastate activities which affect interstate commerce to such an extent "as to make regulation of them appropriate means to the attainment of a legitimate end ...." Id. As Mr. Justice Jackson stated in *Wickard v. Filburn*, 317 U. S. 111, 125, 63 S. Ct. 82, 89 (1942),

> "... even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"

In legislating for a legitimate end under the Commerce Clause, Congress is not restricted to merely an economic definition of commerce but it may also legislate against matters considered to be "deemed a moral and social wrong." *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241, 257, 85 S. Ct. 348, 358 (1964). Indeed, Congress has the power "to declare that an entire class of activities affects commerce." *Maryland v. Wirtz*, 392 U. S. 183, 192, 88 S. Ct. 2017, 2022 (1968); *United States v. Darby*, supra at 120-121, 61 S. Ct. at

460. And, as stated by Mr. Justice Harlan in *Maryland v. Wirtz*, 392 U. S. 183, 193, 88 S. Ct. 2017, 2022, (1968).

> "The contention that in Commerce Clause cases the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest."

In *Perez v. United States*, supra, the Supreme Court found that extortionate credit transactions ("loan sharking") fell into a rationally defined class of activities which Congress could regulate under the Commerce Clause. The Court stated, "Extortionate credit transactions, *though purely intrastate*, may in the judgment of Congress affect interstate commerce." 402 U. S. at 154, 91 S. Ct. at 1361 (emphasis supplied). Thus, such transactions were found to be subject to federal regulation. The same is true of illegal gambling. As defined in 18 U.S.C. § 1955, illegal gambling constitutes a rationally defined class of activities within congressional power to regulate under the Commerce Clause. See *United States v. Darby*, 312 U. S. at 120-121, 61 S. Ct. at 460, where the Court held the class of activities in that case to be properly regulated by Congress without proof that the particular intrastate activity against which a sanction was laid had an effect upon commerce. In *Perez*, the petitioner was found by the Court to be "clearly *a member of the class* which engages in 'extortionate credit transactions' as defined by Congress and the description of that class has the required definiteness." 402 U. S. at 153, 91 S. Ct. at 1361 (emphasis by the Court).

Applying the above standards to the facts of this case, it can readily be seen that the appellants fall within a rationally defined class of activities which Congress has declared to have an adverse effect upon interstate commerce and has thus proscribed. Congress having thus regulated such class of activities, even if intrastate in character, the Act as applied to the appellants is constitutional. As stated by the Supreme Court in *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 121, 62 S. Ct. 523, 527 (1942):

> "It is no answer to suggest, as does respondent, that the federal power to regulate intrastate transactions is limited to those who are engaged also in interstate commerce. The injury, and hence the power, does not depend upon the fortuitous circumstance that the particular person conducting the intrastate activities is, or is not, also engaged in interstate commerce .... It is the effect upon interstate commerce or upon the exercise of the power to regulate it, not the source of the injury which is the criterion of Congressional power."

Even so, the record in the present case conclusively shows the interstate ramifications of the gambling operations conducted by the appellants, in complete vindication of the judgment of the Congress. A broker from New Mexico brought clients of his business into Texas to appellants' gambling club for entertainment purposes. A resident of Tennessee at the instruction of one of the appellants wrote checks upon a national bank in Tennessee to pay his gambling losses incurred

at appellants' establishment in Texas. Appellants maintained bank accounts in a national bank for the purpose of paying business expenses including withholding and Social Security taxes for their employees. A telephone was connected by an interstate communication carrier to the appellants' gambling establishment. Gambling losses were paid in United States currency which entered the flow of commerce. The evidence indicated the use, as a front organization, of a nationwide fraternal organization. Portions of the gambling paraphernalia seized indicated that it had moved in interstate commerce. Although, under the basic concept of the Commerce Clause such proof was not necessary, the evidence conclusively established the existence of that activity.

Congressman Poff, in explaining in definitive detail the titles of the proposed legislation on the floor of the House in speaking of Title VIII, stated:

> "Part A of the title contains a special finding that illegal gambling involves the widespread use of, and has an effect upon, interstate commerce and the facilities of interstate commerce. This finding is of substantive importance to the title because by creating a legislative jurisdictional base it makes Federal gambling investigations and prosecutions possible *without* the necessity of establishing an interstate nexus on a case-by-case basis."

Cong. Rec., Vol. 116, No. 176, p. H 9711 (emphasis supplied).

Appellants' argument that enforcement of the Act infringes on the rights reserved to the states under the Tenth Amendment to the Constitution cannot be maintained with either conviction or plausibility. As stated in *Darby*, "From the beginning and for many years the [Tenth] amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." 312 U. S. at 124, 61 S. Ct. at 462. The exercise of congressional authority under the granted power of the Commerce Clause for the permitted end of controlling illegal gambling as defined in 18 U.S.C. § 1955 is clearly constitutional. "It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states." *United States v. Darby*, 312 U. S. at 114, 61 S. Ct. at 457. The argument that the Tenth Amendment was violated by the conviction of the appellants is simply without any merit.

II.

THE EVIDENCE WAS SUFFICIENT TO SHOW THAT FIVE OR MORE PERSONS PARTICIPATED IN THE GAMBLING OPERATION WITHIN THE MEANING OF 18 U.S.C. § 1955.

The gambling operation prohibited by 18 U.S.C. 1955 must involve "five or more persons who conduct, finance, manage, supervise, direct, or own all or part

of such business; ...." 18 U.S.C. § 1955(b)(1)(ii). Appellants contend that there is no evidence in the record which would even tend to support the proposition that appellants Bumpass and Littlefield conducted, financed, managed, supervised, directed, or owned all or part of the gambling operation. Thus it is argued that the convictions of all defendants must be set aside.

Defendant Littlefield was a guard or watchman for the business. His duty was to admit people to the club. However, he had no discretion as to who was to be admitted. He was on the premises at all times, lived there and used the premises for his domicile. Bumpass was a dealer at the club. He arrived late and relieved other dealers. He dealt at the blackjack games and was stickman at the crap table every night representing the house. The thrust of appellants' argument is that Congress did not intend to include employees such as Littlefield and Bumpass as "persons who conduct, finance, manage, supervise, direct, or own all or part" of the gambling business and that mere employees cannot satisfy the necessary requirements. Appellants' contentions are not well taken.

It was the express intent of Congress to include employees such as Bumpass and Littlefield within the definition of the word "conducts" as used in Section 1955. In the Report of The House Committee on the Judiciary Report No. 91-1549, 91st Cong., 2nd Sess., which Committee reported favorably to the House of Representatives on the Organized Crime Control Act of 1970, that portion of the Report entitled Section Analysis discuss-

ing Title VIII of the Act, at page 53, defines the word "conducts" as follows:

> "This section applies generally to persons who participate in the ownership, management, or conduct of an illegal gambling business. The term 'conducts' refers both to high level bosses and street level employees. It does not include the player in an illegal game of chance, nor the person who participates in an illegal gambling activity by placing a bet."

U. S. Code Cong. and Adm. News, 1970, p. 4029.

Here, the Trial Judge carefully instructed the jury as follows:

> "... a mere employee who has no ownership in such business and who is also without the power to conduct, finance, manage, supervise, or direct such business, could not be considered by you as one of the number of persons necessary to prove a violation of the federal statute under which these defendants are charged.
>
> ....
>
> "The word conduct means to operate, carry on, or cause to function."

We hold that the charge given was entirely adequate to present the factual issue to the jury. Moreover, the evidence presented to the jury was sufficient to con-

vict all of the defendants under Section 1955. See also *United States v. Palmer*, 6 Cir., 1972, ____ F. 2d ____ [Nos. 71-1596 and 71-1597, March 31, 1972].

III.

THE AFFIDAVIT UPON WHICH A SEARCH WARRANT ISSUED FOR THE SEARCH OF THE GAMBLING CLUB WAS SUFFICIENT TO ESTABLISH PROBABLE CAUSE.

On March 11, 1971, a United States Magistrate executed a search warrant to search the Redmen's Club. The facts tending to establish probable cause for the issuance of the warrant were recited in the affidavit of Special Agent Robert M. Bryant of the Federal Bureau of Investigation. Appellants contend that the affidavit is insufficient under *Spinelli v. United States*, 393 U. S. 410, 89 S. Ct. 584 (1969), and *Aguilar v. State of Texas*, 378 U. S. 108, 84 S. Ct. 1509 (1964). A careful reading of the affidavit shows that appellants' contentions are devoid of any merit. See *United States v. Harris*, 403 U. S. 579, 91 S. Ct. 2075 (1971); *United States v. Guinn*, 5 Cir., 1972, 454 F. 2d 29. See also *United States v. Ventresca*, 380 U. S. 102, 108-9, 85 S. Ct. 741, 746 (1965) and *United States v. Squella-Avendano*, 5 Cir., 1971, 447 F. 2d 575.

IV.

INCULPATORY STATEMENTS OF APPELLANT CECIL EUGENE "RED" HARRIS WERE NOT ADMITTED INTO EVIDENCE IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

On May 17, 1971, Cecil Eugene "Red" Harris went to the office of Special Agent Leland Stephens of the Federal Bureau of Investigation to discuss a proposed gambling game at a forthcoming country club golf tournament and the application of the federal gambling statute to that proposed game. During the course of the conversation, Harris made certain inculpatory statements relative to the gambling activities at the Redmen Club.

Harris had been arrested by the FBI on the night of March 12, 1971. At approximately 2 a.m., Special Agent Ben Harrison attempted to interview Harris in a deputy's office at the Lubbock County Sheriff's Office. Before beginning the interview Agent Harrison identified himself and another agent who was present and orally warned Harris of his constitutional rights. In addition to the oral warning Harris was asked to read a Waiver of Rights form. The appellant looked at the form but did not sign it. He indicated to Agent Harrison that he did not wish to be interviewed and Harrison immediately terminated the attempted interview. At approximately 8:30 or 9 a.m. of the same

day, all of the appellants were arraigned before a United States Magistrate. Once again Harris was advised of his rights by the Magistrate in the presence of his own counsel. Appellants were then released on bond. On May 10, 1971, after being indicted on April 17, 1971, the appellants, including Harris, were arraigned upon the indictment in the United States District Court for the Northern District of Texas, Lubbock Division. Harris was advised of his rights for a third time by the Honorable Halbert O. Woodward, United States District Judge.

On May 13, 1971, three days after the arraignment in the District Court, Special Agent Stephens was in Slaton, Texas, a small community approximately fifteen miles from Lubbock, Texas, conducting a police school. At the lunch hour Agent Stephens went to the Citizens State Bank of Slaton to meet Tommy Wallace, president of the bank, to go with Mr. Wallace to the Rotary luncheon. While having a cup of coffee and waiting for Mr. Wallace to finish with a customer, Agent Stephens was approached by the appellant Harris who was also in the bank. Agent Stephens and Mr. Harris had known each other for nineteen years. Appellant Harris asked Agent Stephens if he could see him that afternoon. Agent Stephens told him that he was teaching at the police school and that he would be unavailable. Mr. Harris then inquired if he could see Agent Stephens the next day and he was again told that Stephens would be teaching at the police school. Harris then asked about seeing Agent Stephens some time during the next week. Agent Stephens told him he would be free on Monday and Mr. Harris suggested

the time of 9:30. The following Monday, May 17, 1971, Mr. Harris appeared at the FBI office in Lubbock. This appearance was entirely voluntary. Mr. Harris was not in custody at the time, he was not under any type of restraint, nor was he under any compulsion to appear at the FBI office. Mr. Harris began his conversation with Agent Stephens by asking the agent if he would be in violation of federal law if he operated a gambling game at a forthcoming golf tournament. Agent Stephens told him that if the circumstances were such that such gambling might possibly violate federal law that the law would be enforced. Mr. Harris then volunteered the inculpatory statement concerning his operation of the Redmen's Club. At no time did Agent Stephens question the appellant concerning the facts of this case, the arrest, the indictment, or any of the other defendants. No further statements were made concerning the Redmen's Club and the defendant and Agent Stephens discussed other matters. The entire conversation lasted about ten minutes.

A hearing was held on Harris's motion to suppress the statements. After the hearing the Court entered an order finding that such statement had been voluntarily made, that it was an unsolicited remark, and that it had not been made in response to any custodial interrogation. In essence Harris complains that Agent Stephens failed to administer proper *Miranda* warnings and that he "did not knowingly, clearly, and explicitly waive his right to counsel at this critical stage in the proceedings, and did not know or realize that his conversation could or would be used in court against him." However, as we recently stated in *United*

States v. Trosper, 5 Cir., 1971, 450 F. 2d 319, it is "well settled that an unsolicited remark by a defendant, not in response to any interrogation, does not fall within the rule of *Miranda v. Arizona* ..." Id. at 320. See also *United States v. Powers*, 5 Cir., 1971, 444 F. 2d 260. That is precisely what occurred in this case.

The judgments of conviction are AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-3586
Summary Calendar

D. C. Docket No. CR 5-396

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CECIL EUGENE HARRIS, a/k/a "RED" HARRIS, PHILLIP GALE WOLFE, RONNIE LYNN JONES, MARLIN KEITH BUMPASS, HOUSTON P. LITTLEFIELD, a/k/a "HOOT" LITTLEFIELD and JACKIE WADE HAWKINS,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same is hereby, affirmed.

May 22, 1972

Issued as Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-3586

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CECIL EUGENE HARRIS, a/k/a "RED" HARRIS, PHILLIP GALE WOLFE, RONNIE LYNN JONES, MARLIN KEITH BUMPASS, HOUSTON P. LITTLEFIELD, a/k/a "HOOT" LITTLEFIELD and JACKIE WADE HAWKINS,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(June 19, 1972)

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.[1]

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[1]In our original opinion we noted that House Report 91-1549, 91st Cong., 2nd Sess., contained the following explanation of the word "conducts":

> "The term 'conducts' refers both to high level bosses and street level employees. It does not include the player in an illegal game of chance, nor the person who participates in an illegal gambling activity by placing a bet."

See 1970 Code Cong. & Adm. News at 4029. Petitioners argue that the foregoing is contained within a paragraph of section analysis which discusses 18 U.S.C. § 1511 ("Obstruction of State or local law"), see House Report 91-1549, TITLE VIII, PART B. 1970 Code Cong. & Adm. News at 4028-29, and that the word "conducts" has a different meaning as used in Section 1955. A close reading of the House Report shows that Congress intended the word "conducts" to have the same meaning in each instance. See 1970 Code Cong. & Adm. News at 4028-4030.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

ROOM 400-600 ROYAL ST.
NEW ORLEANS, LA. 70130

April 12, 1972

TO COUNSEL OR PARTIES LISTED BELOW:

No. 871-3886 - U. S. A. vs. Cecil Eugene Harris, etc., et al

Gentlemen:

You are hereby notified that a panel of this court, after due consideration and pursuant to Local Rule 18, has transferred the referenced case to the Summary Calendar for disposition.

Local Rule 18 states: "(a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar. (b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the Clerk, pursuant to directions from the court. (c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar."

Yours sincerely,

EDWARD W. WADSWORTH, Clerk

By Carol A. Haudet
Deputy Clerk

/cg
cc: Mr. Emmett Colvin, Jr.
Mr. William J. Gillespie
Mr. Travis D. Shelton
Mr. Eldon B. Mahon
Mr. Willis Taylor

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-87

CECIL EUGENE HARRIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Texas, petitioners were convicted of having conducted an illegal gambling business in violation of 18 U.S.C. 1955. The court of appeals affirmed without oral argument in a lengthy opinion (Pet. App. A, pp. 18-41).

Petitioners contend, as they did below, that Congress exceeded its power under the Commerce Clause, and violated the Tenth Amendment, in enacting 18 U.S.C. 1955 since that Section does not require proof in an individual case of any effect on interstate commerce from the illegal gambling enterprise. They also argue that the statutory definition of an "illegal gambling

business" as consisting of at least five persons who "conduct, finance, manage, supervise, direct, or own all or part of such business" was not met here since two of the persons on whom the government relied (petitioners Bumpass and Littlefield) were non-supervisory employees. In the main we rely upon the thorough discussion of these contentions contained in the opinion below. (See Pet. App. A, pp. 21–37). We note, in addition, that the constitutionality of the statute has been sustained by all the other courts of appeals that have decided the question under principles announced in *Perez* v. *United States,* 402 U.S. 146. See *United States* v. *Becker,* C.A. 2, No. 72–1105, decided May 30, 1972; *United States* v. *Riehl,* C.A. 3, Nos. 71–2133, 71–2134 and 71–2135, decided May 9, 1972; *United States* v. *Palmer,* C.A. 6, Nos. 71–1596 and 71–1597, decided March 31, 1972, petition for a writ of certiorari pending No. 72–2; *Schneider* v. *United States,* C.A. 8, Nos. 71–1393 and 71–1572, decided April 12, 1972.

The contention that Section 1955 did not mean to include nonsupervisory employees in the concept of those who "conduct", a gambling business is, as the court below held (Pet. App. A, pp. 35–36), refuted by the legislative history of 18 U.S.C. 1511, enacted together with Section 1955. Section 1511 prohibits conspiracy to obstruct the enforcement of the criminal laws of a state with the intent to facilitate an "illegal gambling business." Section 1511 defines an "illegal gambling business" in the same terms as Section 1955. The legislative history of Section 1511 indicates that "Congress' intent [in Section 1955] was to include all

those who participate in the *operation* of a gambling business, regardless how minor their roles * * * and to exclude only customers of the business." *Becker, supra,* slip op. p. 4 (emphasis in original). That indeed is the natural meaning of "conduct" in the context of a gambling business.

Finally, we note that Rule 18 of the Fifth Circuit, allowing that court to dispense with oral argument as in this case, has been held not to constitute a denial of the effective assistance of counsel. See *e.g., Hoyt and Bowman* v. *United States,* Nos. 71–5907 and 71–5952, certiorari denied, 405 U.S. 995; *Grimes and Guinn* v. *United States,* Nos. 71–1277 and 71–1296, certiorari denied, June 12, 1972; see also *United States* v. *Baber,* 447 F. 2d 1267, 1270–1271 (C.A. D.C.), certiorari denied, 404 U.S. 957.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

U.S. GOVERNMENT PRINTING OFFICE 1972